UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WALTER WASSON,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 90-0193 P***
	)	
PROVIDENCE WASHINGTON INSURANCE COMPANY,	)	
	)	
Defendant	)	

AMENDED MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [1]

Defendant Providence Washington Insurance Company (``Providence Washington") seeks summary judgment as to all claims against it in this diversity action alleging, *inter alia*, breach of its duty to defend MSM Enterprises, Ltd. (``MSM"), which has assigned its interest in this lawsuit to plaintiff Walter Wasson. For the reasons articulated below, I grant the defendant's motion as to all claims except those in Count IV that state that the defendant's failure to provide MSM a copy of the policy and its slowness in responding to notice of the claim breached the implied covenant of good faith and fair dealing.

I. SUMMARY JUDGMENT STANDARDS

[1] Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment. The original memorandum decision entered on July 10, 1991 is withdrawn and supplanted by this amended decision.

Fed. R. Civ. P. 56(b) provides that ``[a] party against whom a claim . . . is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Such motions must be granted if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and ``give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). ``Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is ``material" if it may affect the outcome of the case; a dispute is ``genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario, 917 F.2d* at 73.

II. FACTS

Providence Washington insured MSM from June 1, 1985 to June 1, 1986 under Policy No. BRPP 747853. Affidavit of Gregory Agnone (``Agnone Affidavit") (attached to Docket Item 14); Exhibit to Agnone Affidavit (``Policy") at 1. By letter dated October 27, 1986 counsel for MSM notified Morse, Payson & Noyes[2] that a complaint filed by Walter Wasson ``undoubtedly" would be amended to name MSM a defendant. Exh. A to Plaintiff's Memorandum of Law in Support of His Reply to Defendant's Motion for Summary Judgment (``Plaintiff's Memorandum")[3]. Wasson did amend his complaint to name MSM a co-defendant. *See* Exh. E to Plaintiff's Memorandum (``Underlying Wasson Complaint"). Wasson alleged that he had begun his employment with MSM as lead trainee at the Maine Mall Burger King in April 1983 and had been promoted to a management position from which he was summarily discharged in February 1986 in retaliation for his willingness to testify at a ``Labor Board" proceeding. *See id.* && 4-10. On June 10, 1987 counsel for B.K. Management Group wrote to Morse, Payson & Noyes enclosing a copy of the amended complaint and requesting that it be forwarded to the proper insurer. Exh. J to Plaintiff's Memorandum (Defendant's Response to Plaintiff's Request for Admissions) (``Defendant's First Admission") & 5. By letter to

[2] MSM apparently procured its Providence Washington insurance through the Frank B. Hall Agency and then switched to the Morse, Payson & Noyes insurance agency, which had no agency relationship with Providence Washington. *See* Exh. H to Plaintiff's Memorandum (Defendant Providence Washington Insurance Company's Response to Plaintiff's Second Request for Admissions) (``Defendant's Second Admission") & 10.

[3] Materials submitted by the plaintiff in opposition to the instant motion flaunt the requirements of Fed. R. Civ. P. 56(e). The plaintiff's exhibits consist largely of unsworn, uncertified copies of documents attached to his memorandum of law. Fed. R. Civ. P. 56(e) mandates that such papers be authenticated either by certification or via affidavit. While I do not condone these serious procedural shortcomings, I nevertheless proceed to consider the exhibits as though properly authenticated given the absence of objection from the defendant.

MSM dated September 22, 1987 Bob Bousquet, a claim supervisor for Providence Washington, acknowledged receipt of suit papers and denied coverage on the ground that termination of an employee, an intentional act, was not covered by the policy. Exh. B to Plaintiff's Memorandum; Defendant's First Admission & 6. Providence Washington informed MSM of no other basis for denial of defense prior to initiation of the instant suit. Exh. H to Plaintiff's Memorandum (Defendant Providence Washington Insurance Company's Response to Plaintiff's Second Request for Admissions) (``Defendant's Second Admission") & 1. Providence Washington admits that it knows of no factual investigation made concerning the claim, *id.* & 2, and that it has no evidence that Bousquet conferred with anyone else at Providence Washington prior to denying coverage, Exh. I to Plaintiff's Memorandum (Defendants [sic] Providence Washington Insurance Company's Answers to Plaintiff's Interrogatories), Interrogatory No. 2. By letter dated March 6, 1989 counsel for MSM forwarded another copy of the complaint to Providence Washington, noting, ``despite my more recent request, I've not received a copy of the contract." Exh. C to Plaintiff's Memorandum. Providence Washington admits that it has not provided a copy of the insurance policy to MSM. Defendant's First Admission & 8. Attorney John W. Chapman, who represented MSM in the *Wasson* case beginning in 1988, avers that he repeatedly requested a copy of the policy and that MSM's refusal to provide it prevented him from determining the correctness of its stance. Exh. K to Plaintiff's Memorandum (Affidavit of John W. Chapman) (``Chapman Affidavit") && 3-5. Chapman advised MSM to settle. *Id.* & 8. He avers that, ``[h]ad I known that Providence Washington would be asserting other policy defenses to coverage, my decision with regard to the settlement might have been different, depending upon any additional coverage defenses that Providence Washington might have asserted." *Id.* & 11. By letter dated April 21, 1989 counsel for MSM notified Providence Washington that MSM was contemplating a settlement that would leave it ``with no out-of-pocket expense" and possibly include a stipulated

judgment. Exh. D to Plaintiff's Memorandum. On May 23, 1989 MSM and Wasson entered into a stipulated judgment for $150,000. Exh. G to Plaintiff's Memorandum. On May 26, 1989 MSM assigned its rights against Providence Washington to Wasson ``[i]n consideration of the entry of Stipulated Judgment." Exh. F to Plaintiff's Memorandum.

III. LEGAL ANALYSIS

Wasson as assignee of MSM sues Providence Washington for (1) failure to defend constituting breach of contract (Count II), breach of the duty of good faith and fair dealing (Count IV), negligence (Count VII) and bad faith (Count VIII); (2) failure to respond promptly to MSM's notice of claim, constituting breach of contract (Count I), breach of the duty of good faith and fair dealing (Count IV) and negligence (Count V); and (3) failure to provide the policy to MSM, constituting breach of contract (Count III), breach of the duty of good faith and fair dealing (Count IV), negligence (Count VI) and bad faith (Count IX). Wasson also alleges breach of the Maine Insurance Code (Count X) and actual malice warranting punitive damages (Count XI). The parties' papers both contemplate application of Maine law.

A. Duty to Defend

Providence Washington contractually undertook a duty to defend MSM against suits seeking damages for ``bodily injury" or ``property damage" caused by an ``occurrence," Policy, Provisions Applicable to Section II: General Liability at 13, or for ``personal injury," Policy, Broad Form Comprehensive General Liability Endorsement at 2. Wasson initially asserts that Providence Washington has waived or is estopped from asserting grounds for denial of defense other than that communicated by Bousquet. *See* Plaintiff's Memorandum at 6.

Waiver is defined under Maine law as ``the voluntary and knowing relinquishment of a right." *Roberts v. Maine Bonding & Casualty Co.*, 404 A.2d 238, 241 (Me. 1979). Waiver can be inferred, *see, e.g., Bowen v. Merchants Mut. Casualty Co.*, 107 A.2d 379, 384 (N.H. 1954); however, Providence Washington's actions in this case do not convey such a relinquishment. At most, Providence Washington mistakenly believed its ground for denial sufficient. It did not knowingly waive all other grounds.

Wasson alternatively contends that Providence Washington is estopped from asserting other grounds because it failed to send MSM a copy of the policy and/or because it chose to rest its refusal to defend on one ground. *See* Plaintiff's Memorandum at 2-4, 6. The Maine Supreme Judicial Court (``Law Court") describes estoppel as ``forbid[ding] the assertion of the truth by one who has knowingly induced another to believe what is untrue and to act accordingly." *Roberts*, 404 A.2d at 241. The Law Court cautions that, ``[b]efore the doctrine of estoppel may be invoked, the declarations or acts relied upon must have induced the party seeking to enforce an estoppel to do what resulted to his detriment and what he would not otherwise have done." *Id.* (citation omitted). MSM was not mislead as to the scope of its coverage; Providence Washington (for the reasons discussed below) had no duty to defend. The record moreover demonstrates no detriment to MSM. Chapman merely speculates that his advice to settle ``might have been different" had he known of other grounds for denial of coverage. As Providence Washington observes, it is difficult to see how MSM's settlement with Wasson hurt MSM or how MSM rationally could have sought a different outcome had it known of other grounds for denial. *See* Defendant Providence Washington's Reply Memorandum in Support of its Motion for Summary Judgment (``Defendant's Reply Memorandum") at 6-7.

Moving to the merits, Wasson first contends that the Underlying Wasson Complaint alleged an ``occurrence" within the meaning of the policy. The policy provides:

> The company will pay on behalf of the **Insured** all sums which the **Insured** shall become legally obligated to pay as damages because of **bodily injury or property damage** to which this insurance applies, caused by an **occurrence** . . . .

Policy, Provisions Applicable to Section II: General Liability at 13. An ``occurrence" is defined as

> an accident, including continuous or repeated exposure to conditions, which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the **Insured** . . . .

Policy, Definitions Applicable to Section II at 21.

Under Maine law, an insurer's duty to defend is determined by comparing the allegations in the complaint against applicable policy provisions. *See, e.g., L. Ray Packing Co. v. Commercial Union Ins. Co.*, 469 A.2d 832, 833 (Me. 1983). ``The plaintiff is entitled to a defense if there exists any legal or factual basis, which could be developed at trial, that would obligate the insurers to pay under the policy." *Id.* (citations omitted).

The Law Court recently determined that a complaint alleging wrongful discharge of an employee constitutes an ``occurrence" for purposes of the duty to defend, in that the insured may not have subjectively wanted or subjectively foreseen any resultant bodily injury. *Maine Bonding & Casualty Co. v. Douglas Dynamics, Inc.*, No. 5893, slip op. at 3-6 (Me. July 29, 1991). This holding, construing the identical relevant language on nearly identical facts, compels the conclusion that the Underlying Wasson Complaint stated a covered ``occurrence."

Wasson concedes that his Underlying Complaint alleged no ``property damage," Plaintiff's Memorandum at 15, but contends it did allege ``bodily injury," *id.* at 11-14. The policy defines ``bodily injury" as

> bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom . . . .

Policy, Definitions Applicable to Section II at 20. Wasson argues that the Law Court, if confronted with the issue, would define ``bodily injury" to encompass emotional pain. Plaintiff's Memorandum at 12-14. The plaintiff cites *Gammon v. Osteopathic Hospital of Maine, Inc.*, 534 A.2d 1282 (Me. 1987) (allowing tort recovery for emotional injury) in support of his view that Maine's attitude toward damages for emotional distress is ``progressive." Plaintiff's Memorandum at 13. However, the Law Court recently signalled that ``bodily injury," for insurance purposes, requires at least a physical manifestation of the alleged emotional injury. *Douglas Dynamics*, slip op. at 6. Such a construction aligns with the majority view in other jurisdictions. *See, e.g.*, *Aim Ins. Co. v. Culcasi*, 280 Cal. Rptr. 766, 771-76 (Ct. App. 6th Dist. 1991); *Allstate Ins. Co. v. Diamant*, 518 N.E.2d 1154, 1156-57 (Mass. 1988); *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 726 P.2d 439, 443 (Wash. 1986); *Farm Bureau Mut. Ins. Co. v. Hoag*, 356 N.W.2d 630, 633 (Mich. Ct. App. 1984); *but see Voorhees v. Preferred Mut. Ins. Co.*, 588 A.2d 417, 421-22 (N.J. Super. Ct. App. Div. 1991).

Wasson next asserts that, even if ``bodily injury" requires a physical manifestation, his allegations of ``great pain" put his physical well-being at issue, triggering the duty to defend. *See* Plaintiff's Memorandum at 11-12. In my view, the Underlying Wasson Complaint cannot reasonably be construed as having alleged a physical manifestation of emotional pain. Nonetheless, the Law Court recently determined that an allegation of emotional distress triggered the duty to defend because of the possibility (however remote) that the plaintiff would claim physical manifestations bringing his injury within the bounds of policy coverage. *Douglas Dynamics*, slip op. at 5-6. The Underlying Wasson Complaint hence alleged a ``bodily injury" for purposes of the duty to defend.

The defendant counters that, even if the Underlying Wasson Complaint stated an ``occurrence" and a ``bodily injury" for purposes of the duty to defend, that duty was relieved by the existence of an employee-exclusion clause stating in relevant part:

> This insurance does not apply: . . .
> (j) to **bodily injury** to any employee of the **Insured** arising out of and in the course of his employment by the **Insured** . . . .

Policy, Provisions Applicable to Section II: General Liability at 13-14. The parties' research, as well as my own, yields no published Law Court case construing such an exclusion in the context of a claim of employment termination. Wasson suggests that claims arising from termination would not necessarily be construed as ``arising out of and in the course of his employment" under Maine law, given that Maine has declared that a mental injury resulting from termination does not arise from employment for purposes of its workers' compensation laws. *See* Plaintiff's Memorandum at 15-16 (citing 39 M.R.S.A. ' 51(3)). I am not persuaded that Maine would import its workers' compensation definition into the construction of private insurance contracts. I am unable to unearth a single published case in which a court has reached such a conclusion in construing an employee-exclusion clause in the context of a termination or wrongful discharge. The caselaw of which I am aware holds unanimously that the termination of an employee unambiguously ``arises from" or is related to employment for purposes of an employee-exclusion clause. *See Fidelity & Guar. Ins. Underwriters, Inc. v. City of Kenner*, 894 F.2d 782, 784-85 (5th Cir. 1990); *West Am. Ins. Co. v. Bank of Isle of Wight*, 673 F. Supp. 760, 766 (E.D. Va. 1987); *Loyola Marymount Univ. v. Hartford Accident & Indem. Co.*, 271 Cal. Rptr. 528, 531 (Ct. App. 2d Dist. 1990); *California Ins. Guar. Ass'n v. Wood*, 266 Cal. Rptr. 250, 252-53 (Ct. App. 4th Dist. 1990); *Watson v. Town of Arcadia*, 542 So.2d 1168, 1170-71 (La. Ct. App. 2d Cir.), *writ denied*, 548 So.2d 1234 (La. 1989); *National Ben Franklin Ins. Co. v. Harris*, 409 N.W.2d 733,

735-36 (Mich. Ct. App. 1987); *Pleasure Driveway & Park Dist. v. Aetna Casualty & Sur. Co.*, 400 N.E.2d 651, 652-53 (Ill. Ct. App. 3d Dist. 1980). Further, courts have found workers' compensation considerations irrelevant to the construction of employee-exclusion clauses unless the clauses specifically reference workers' compensation. *See Omark Indus., Inc. v. Safeco Ins. Co.*, 590 F. Supp. 114, 117-20 (D. Or. 1984); *Harris*, 409 N.W.2d at 736. In the absence of a clear signal from the Law Court, I shall presume that Maine would join other courts in holding that the employee-exclusion clause at issue excludes coverage for bodily injuries flowing from the termination of an employee.

Wasson finally argues that, regardless of whether he stated a claim for an ``occurrence" causing ``bodily injury" or ``property damage," he stated a claim for ``personal injury" covered by the policy, triggering the duty to defend. *See* Plaintiff's Memorandum at 14-15. The policy defines ``personal injury" as

> injury arising out of one or more of the following offenses committed during the policy period:
>
> (1) false arrest, detention, imprisonment, or malicious prosecution;
>
> (2) wrongful entry or eviction or other invasion of the right of private occupancy;
>
> (3) a publication or utterance
>
> (a) of a libel or slander or other defamatory or disparaging material, or
>
> (b) in violation of an individual's right of privacy . . . .

Policy, Broad Form Comprehensive General Liability Endorsement at 2. The plaintiff observes that in the Underlying Wasson Complaint he alleged damage to his ``professional reputation," potentially stating a claim for libel, slander or invasion of privacy. Plaintiff's Memorandum at 14-15. As liberal as is Maine's comparison test for determining the duty to defend, *see, e.g., Massachusetts Bay Ins. Co. v. Ferraiolo Constr. Co.*, 584 A.2d 608, 609 (Me. 1990), I am unable to find a Law Court case in which a

cause of action was discerned solely from a conclusory refrain enumerating damages. Had the plaintiff alleged that he had been slandered, libeled or his privacy invaded, or had he stated facts from which one could discern a cause of action (for example, that his employer told others he had robbed the Burger King), Providence Washington would have been obligated to defend. The plaintiff here did neither. The Underlying Wasson Complaint cannot fairly be read as making out a cause of action for a ``personal injury" within the meaning of the policy.

Providence Washington did not have a duty to defend on the Underlying Wasson Complaint. Accordingly, it is entitled to summary judgment as a matter of law on Counts II, VII and VIII and the claim in Count IV of breach of the duty of good faith and fair dealing based on breach of the duty to defend.

B. Failure to Respond Promptly

Wasson alleges that Providence Washington failed to respond promptly to MSM's claim by its silence between October 27, 1986, when counsel for MSM notified Morse, Payson & Noyes that a complaint filed by Walter Wasson ``undoubtedly" would be amended to name MSM as a defendant, and September 22, 1987, the date of Bousquet's letter denying coverage. *See* Plaintiff's Memorandum at 21-22. Wasson also raises a question whether the Bousquet letter was promptly mailed or received, given the fact that it was date-stamped as received by Morse, Payson & Noyes on October 26, 1988. *See id.*

Wasson alleges in Count I that the alleged failure to respond promptly breached the insurance contract. I have searched the summary-judgment record in vain for evidence of a contractual promise to respond promptly to claims; nor does the plaintiff point to any. Summary judgment for Providence Washington hence must issue as to Count I.

Wasson asserts in Count V that Providence Washington's delayed response was negligent. Four elements comprise a cause of action in negligence: (1) existence of a duty, (2) breach of the duty, (3) proximate cause linking breach and injury and (4) actual loss or damage. *Prosser and Keeton* ' 30 at 164-65. Assuming *arguendo* that Maine recognized a duty to respond promptly to an insured, the record does not demonstrate actual loss or damage resulting from the alleged tardy response.[4] Providence Washington hence must prevail in its request for summary judgment as to Count V.

Wasson finally contends in Count IV that the failure to respond breached the implied duty of good faith and fair dealing. The Law Court has signalled a willingness to imply such a duty in insurance contracts. *See, e.g., Seabury Hous. Assoc. v. Home Ins. Co.*, 695 F. Supp. 1244, 1248-49 (D. Me. 1988); *Simpson v. Hanover Ins. Co.*, 588 A.2d 1183, 1187 (Me. 1991). The record herein supports a cause of action for such a breach. Good-faith performance

> emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ``bad faith" because they violate community standards of decency, fairness or reasonableness.

Restatement (Second) of Contracts ' 205 comment a at 100 (1981). MSM advised its insurance agent in October 1986 that Wasson's complaint ``undoubtedly" would be amended to name MSM and firmly conveyed that MSM had been named a defendant on June 10, 1987. Providence Washington's delay in responding until September 22, 1987 violated its insured's expectation of prompt attention

[4] Wasson argues that MSM was harmed by the delayed response in that it ``clearly had to hire counsel, incur attorney's fees during the litigation, and devote valuable time and resources to the litigation of this claim . . . ." Plaintiff's Memorandum at 22. These ``injuries" appear to have been proximately caused by Providence Washington's rightful refusal to defend rather than by any delay in response as such. In any event, there is no evidence apportioning costs attributable to delay.

given that agent Bousquet made no inquiries and conducted no investigation in denying coverage. *See, e.g., Robinson v. Fidelity & Deposit Co.*, 383 S.E.2d 95, 99-100 (W. Va. 1989) (response within 30 days reasonable); *Longworth v. Van Houten*, 538 A.2d 414, 422 (N.J. Super. Ct. App. Div. 1988) (six-month delay in responding to settlement offer unreasonable given lack of need for investigation). Proof of actual loss is not essential. *See Restatement (Second) of Contracts* ' 346(2) (1981).

C. Failure to Provide Copy of Policy

Wasson asserts that Providence Washington evidenced a ``cavalier attitude" toward MSM in its refusal to provide a copy of the policy upon request. Plaintiff's Memorandum at 2. Wasson first claims in Count III that this refusal breached Providence Washington's contract with MSM. Again, I find no evidence of record of such a contractual promise; Providence Washington hence is entitled to summary judgment as to Count III. Wasson's allegation of negligence in Count IV fails for the same reason described above -- failure to demonstrate actual injury or loss. Wasson contends in Count IX that Providence Washington was guilty of ``bad faith" in refusing to provide the policy. The Law Court has recognized ``bad faith" in insurance cases in the context of bad-faith refusal to defend, for which the insured is compensated by the award of attorney fees. *See, e.g., Allstate Ins. Co. v. Earley*, 502 A.2d 1047 (Me. 1986). ``Bad faith" also could be construed as an allegation of breach of the implied duty of good faith and fair dealing or as a request for punitive damages; however, Wasson raises these claims elsewhere. The ``bad faith" asserted in Count IX therefore appears either inapposite or redundant of other claims.

Providence Washington is not, however, entitled to summary judgment as to Wasson's claim in Count IV that its failure to provide a copy of the policy breached the implied covenant of good faith and fair dealing. Chapman avers that he ``repeatedly requested" a copy of the policy, Chapman Affidavit & 5; Providence Washington admits that it failed to provide one, Defendant's First Admission & 8. Providence Washington's conduct is precisely the kind that the implied covenant is designed to deter -- ``interference with or failure to cooperate in the other party's performance." *Restatement (Second) of Contracts* ' 205 comment d at 101 (1981). As explained above, proof of actual loss is not essential.

D. Breach of Maine Insurance Code

Wasson argues in Count X that Providence Washington breached 24-A M.R.S.A. ' 2436, which provides that an insurer must pay or dispute a ``claim for payment of benefits" within 30 days. Providence Washington contends that ' 2436 is inapplicable because it provides a remedy only to first-party insureds to whom benefits are directly payable. *See* Defendant's Memorandum of Law in Support of Motion for Summary Judgment (``Defendant's Memorandum") at 11. The statute is irrelevant, but for a different reason.[5] It applies to a ``claim for payment of benefits," not to requests for defense. Benefits in a case such as this would be payable only when the insured became legally obligated to pay by reason of liability imposed by law. *See, e.g., Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1183 (7th Cir.), *cert. denied*, 449 U.S. 1033 (1980). Wasson's claim was not reduced to judgment until the case settled on May 23, 1989, after Providence Washington already had communicated denial of defense and of coverage.

[5] I agree with the plaintiff, *see* Plaintiff's Memorandum at 17-18, that the defendant construes ' 2436 too narrowly. It applies by its terms to claims made by insureds, regardless of to whom the proceeds are payable.

Wasson next asserts in Count X that Providence Washington breached 24-A M.R.S.A. ' 2436-A, proscribing unfair claims practices. The defendant argues persuasively that application of ' 2436-A in this instance would be impermissibly retroactive. *See* Defendant's Memorandum at 12. Under Maine law, a statute is considered retroactive if applied ```to determine the legal significance of acts or events that have occurred prior to the statute's effective date.'" *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816 (Me. 1980) (quoting *State Comm'n on Human Relations v. Amecon Div. of Litton Sys., Inc.*, 360 A.2d 1, 3-4 (Md. 1976)). Statutes must be applied prospectively in the absence of legislative intent to the contrary. *See, e.g., Terry v. St. Regis Paper Co.*, 459 A.2d 1106, 1109 (Me. 1983). Both parties agree that ' 2436-A became effective on September 29, 1987. *See* Plaintiff's Memorandum at 18; Defendant's Memorandum at 12. The relevant actions of which Wasson complains took place by September 22, 1987, the date of the Bousquet letter denying defense and coverage.[6] Summary judgment hence must issue in favor of Providence Washington as to Count X.

E. Actual Malice

Wasson's causes of action for negligence having failed, his claim in Count XI for punitive damages necessarily collapses. *See, e.g., Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985) (punitive damages based upon tortious conduct available only if defendant acted with malice).

[6] The plaintiff argues that a material issue of fact as to when MSM received the Bousquet letter precludes summary judgment. *See* Plaintiff's Memorandum at 18. The Morse, Payson & Noyes date stamp does not raise a genuine issue of material fact. The fact that the letter was date-stamped as received by Morse, Payson & Noyes in 1988 simply does not support an inference that MSM received the letter thereafter, given the fact that the letter was addressed directly to MSM.

IV. CONCLUSION

For the foregoing reasons, defendant Providence Washington's motion for summary judgment is hereby ***GRANTED*** as to all claims except for those in Count IV that state that the defendant's failure to provide its insured a copy of the policy and its delay in responding to notice of the claim breached the implied contractual covenant of good faith and fair dealing.

Dated at Portland, Maine this 13th day of August, 1991.

_____

David M. Cohen
United States Magistrate Judge